Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

RANCHO VIEJO, LLC,

Petitioner,

v.

GALE A. NORTON, Secretary of the Interior, *et al.*,*

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the D.C. Circuit's decision holding, on grounds that conflict with a recent decision of the Fifth Circuit, that Congress has the authority under the Commerce Clause of the Constitution, through application of the Endangered Species Act, to authorize the regulation of private lands to protect against theoretical harm to the habitat of the wholly intrastate and commercially-irrelevant arroyo toad, is contrary to this Court's recent Commerce Clause decisions in *United States v. Lopez*, *United States v. Morrison*, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, and *United States v. Jones.*

RULES 14.1(b) AND 29.6 STATEMENT

Petitioner, Rancho Viejo LLC, is a California limited liability corporation that has never issued shares to the public. It does not have a parent corporation, nor is there any publicly-held company which owns ten percent or more of its stock.

Respondents are: Gale A. Norton, Secretary of the Interior; the United States Department of the Interior; the United States Fish and Wildlife Service; the United States Army Corps of Engineers; and Colonel Richard G. Thompson, Los Angeles District Commander, U.S. Army Corps of Engineers.

The following additional entities participated as *amici curiae* in the Court of Appeals or in the District Court: the National Wildlife Federation and the Pacific Legal Foundation.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Rancho Viejo, LLC ("Rancho Viejo") respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 323 F.3d 1062. That court's per curiam order denying Petitioner's petition for rehearing en banc, and the opinions of Judges Sentelle and Roberts dissenting from the denial of the petition for rehearing en banc (Pet. App. 32a-37a), are reported at 334 F.3d 1158. The opinion of the district court is unofficially reported at 2001 WL 1223502 and 32 Envt'l L. Rep. 20,112.

STATEMENT OF JURISDICTION

The decision of the court of appeals upholding the constitutionality of regulations extending the federal Endangered Species Act to wholly intrastate, non-commercial species was entered on April 1, 2003. The court denied a petition for rehearing on July 22, 2003. A timely request for extension, filed on October 10, 2003, was granted by Chief Justice Rehnquist on October 16, 2003, extending the time in which to file this petition until November 19, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. Jurisdiction in the District Court was based on 28 U.S.C. § 1331. Jurisdiction in the Court of Appeals was based on 28 U.S.C. § 1291.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are as follows:

1) U.S. Const. Art. I, § 8, cl.3: "The Congress shall have power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

2) 16 U.S.C. § 1532(6): "The term 'endangered species' means any species which is in danger of extinction throughout all or a significant portion of its range ...."

3) 16 U.S.C. § 1532(19): "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."

4) 16 U.S.C. § 1538(a)(1): "Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for

any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from the United States;

(B) take any such species within the United States or the territorial sea of the United States;

(C) take any such species upon the high seas;

(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(F) sell or offer for sale in interstate or foreign commerce any such species; or

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

STATEMENT OF THE CASE

As Judge Sentelle noted below in his dissent from the denial of the petition for rehearing en banc, this case involves a Commerce Clause challenge to the federal government's regulation of "an activity that is neither interstate nor commerce." Pet. App. 33a. Specifically, this case addresses whether a federal regulatory agency has exceeded the scope of the Commerce Clause by extending § 9(a)(1)(B) of the federal Endangered Species Act to wholly intrastate, non-commercial species, and by prohibiting such non-commercial activity as the erection of a fence on private property merely because the fence might hinder movement of those species.

Petitioner Rancho Viejo, LLC ("Ranch Viejo") is the owner of a 202-acre parcel of land in San Diego County, California, 52 acres of which it proposes to utilize for the construction of homes. Joint Stipulation of Facts ("JS") ¶ 2 (Pet. App. 38a). Rancho Viejo has been threatened with federal prosecution for erecting a perimeter fence on its property, and its efforts to obtain the necessary grading permits from local governmental officials have been thwarted, because of assertions by the United States Fish and Wildlife Service (the "Service") that a portion of Rancho Viejo's property may be potential habitat for the southwestern arroyo toad (*Bufo microscaphus californicus*). JS ¶¶ 10, 12 (Pet. App. 41a). The arroyo toad was listed as "endangered" by the United States Fish and Wildlife Service (the "Service") in 1994 pursuant to the Endangered Species Act of 1973 ("ESA"), Pub. L. 93-205, 81 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-44). *See* JS ¶¶ 4, 9, 10 (Pet. App. 39a, 41a); *see also* 58 Fed. Reg. 41,231 (Aug. 3, 1993) (proposed listing); 59 Fed. Reg. 64,859 (Dec. 16, 1994) (final rule). The Service's listing did not contain express findings of any connection between the arroyo toad and interstate commerce, and in a subsequent designation of 182,360 acres as arroyo toad habitat the Service specifically found that its habitat designation would have no significant impact on commerce. JS ¶ 4 (Pet. App. 39a); 66 Fed. Reg. 9414, 9440 (Feb. 7, 2001).

Asserting that Respondents' actions—both in listing the arroyo toad and in threatening prosecution for conduct that might effect the toad's habitat and movement—exceeded Congress' power to regulate commerce among the states, Rancho Viejo brought this suit for declaratory and injunctive relief. Complaint ¶¶ 1, 34.

The parties executed an extensive Joint Stipulation of Facts (Pet. App. 38a-43a) and subsequently filed cross motions for summary judgment. The district court, Judge Ellen Segal Huvelle, denied Rancho Viejo's motion for summary

judgment and, after rejecting Defendants' contention that the case was not ripe, granted Defendants' motion for summary judgment, holding that the decision of the court of appeals in *National Ass'n of Home Builders v. Babbit*, 130 F.3d 1041 (D.C. Cir. 1997) ("*NAHB*"), was dispositive, notwithstanding the subsequent decisions in *United States v. Morrison*, 529 U.S. 598 (2000), and *Solid Waste Agency of N. Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"). The district court entered final judgment for Defendants on August 20, 2001. Rancho Viejo's timely notice of appeal was filed on October 17, 2001.

On appeal, a panel of the court of appeals, consisting of Chief Judge Ginsburg and Judges Edwards and Garland, affirmed. Pet. App. 1a-31a. Petitioner's petition for rehearing and rehearing en banc was subsequently denied on July 22, 2003, with dissenting opinions by Judges Sentelle and Roberts emphasizing that the panel's decision is inconsistent with this Court's Commerce Clause precedents and conflicts with the decision of the Fifth Circuit in *GDF Realty, Inc. v. Norton*, 326 F.3d 622 (5th Cir. 2003). *See* Pet. App. 32a-37a.

REASONS FOR GRANTING THE WRIT

The lower courts—most recently the D.C. Circuit below and the Fifth Circuit in *GDF Realty*—have been struggling to find a rationale that would render the government's extension of § 9(a)(1)(B) of the federal Endangered Species Act to wholly intrastate, non-commercial species consistent with this Court's Commerce Clause jurisprudence. Their efforts, described in Part II below, have given birth to a number of different, mutually-exclusive rationales, creating a split in reasoning among the circuits that undermines the holdings of those courts. More fundamentally, as described in Part I below, the different rationales that have been relied upon are simply incompatible with this Court's decisions in *Lopez*, *Morrison*, *SWANCC*, and *Jones*, and would, if allowed to remain as precedent, destroy this Court's long-recognized distinction between that which is national and that which is

truly local. *See United States v. Lopez*, 514 U.S. 549, 557 (1995) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)). Certiorari is warranted here to address this split in circuit court rationales in an area of constitutional significance, and to address whether Congress has the authority, consistent with this Court's Commerce Clause precedent, to regulate wholly intrastate, non-commercial species and the local activities that affect their habitat.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S RECENT COMMERCE CLAUSE DECISIONS.

In the wake of this Court's landmark decision in *United States v. Lopez*, reaffirming the foundational principle that the national government has only limited, enumerated powers, the lower courts have been faced with Commerce Clause challenges to a number of federal statutes and regulations aimed at conduct that has nothing to do with interstate commerce. *See, e.g.*, Glen H. Reynolds & Brannon P. Denning, *Lower Court Readings Of Lopez, Or What If The Supreme Court Held A Constitutional Revolution And Nobody Came?*, 2000 Wisc. L. Rev. 369 (2000) (citing cases). Of particular relevance here, the D.C. Circuit in 1997 rejected a Commerce Clause challenge to federal regulation under the Endangered Species Act of wholly intrastate activities affecting the Delhi Sands Flower-Loving Fly, a subspecies that exists only in a small area of southern California. *NAHB*. As Judge Sentelle noted in dissent at the time, that decision was hard to square with *Lopez*. It is even harder to square with this Court's subsequent reaffirmation and explication of *Lopez* in *Morrison*, *SWANCC*, and *Jones*. Nevertheless, the D.C. Circuit's decision below followed its own decision in *NAHB* rather than this Court's decisions.

Lopez set out three categories of activity that could be regulated under the Commerce Clause power: 1) "the use of the channels of interstate commerce"; 2) "the instrumentalities of interstate commerce, or persons or things in interstate

commerce, even though the threat may come only from intrastate activities"; and 3) "those activities having a substantial relation to interstate commerce ... *i.e.*, those activities that substantially affect interstate commerce." *Lopez*, 514 U.S., at 558-59 (citations omitted, emphasis added). Although parts of the ESA are clearly permissible as regulations of either the channels or instrumentalities of commerce, *see* 16 U.S.C. §§ 1538(a)(2)(A), (C), (D) (banning the importation, exportation, or sale of listed species in interstate commerce); 16 U.S.C. §§ 1532(19), 1538(a)(2)(B) (banning the hunting, trapping, capturing and collecting of endangered species destined for interstate commerce); *cf. United States v. Bramble*, 103 F.3d 1475 (9th Cir. 1996) (upholding ban on possession of bald eagle feathers, the commerce in which was endangering the bald eagle), this case involves neither. Rather, the listing of the arroyo toad giving rise to this case can stand only if it is directed at activity that "substantially affects commerce."

This Court in *Lopez* set forth four factors to consider in addressing whether a federal regulation is a permissible exercise of Commerce Clause authority under the "substantial effects" test. First, was the regulation one of "economic activity." Second, did the statute have an "express jurisdictional element." Third, were there legislative findings regarding the effects on interstate commerce. And fourth, was the link between the regulated activity and the effect on commerce so attenuated as to leave no stopping point to Congress's Commerce Clause power. Those factors were reaffirmed and elaborated upon by this Court in *Morrison*. 529 U.S., at 610-13; *see also Groome Resources Ltd., L.L.C. v. Parish of Jefferson*, 234 F.3d 192, 203-04 (5th Cir. 2000) (recognizing that in *Morrison* this Court "elucidated" and "refined" the *Lopez* analysis). As discussed below, in its decision upholding the listing of the arroyo toad and Respondents' subsequent enforcement actions, the D.C. Circuit mischaracterized one factor, ignored two others, and ren-

dered meaningless the fourth factor of this Court's four-prong substantial effects test.

A. The D.C. Circuit's position that non-economic activity may be considered for purposes of the Commerce Clause four-prong substantial effects test conflicts with the express recognition in *Morrison* that this Court has heretofore *only* considered economic activity when applying its substantial effects test.

Perhaps the most obvious and important conflict between the D.C. Circuit's holdings below and in *NAHB*, on the one hand, and the holdings of this Court, on the other, is with respect to the first *Lopez* prong—i.e., whether non-economic activity may be considered for purposes of the substantial effects test. In *NAHB,* the D.C. Circuit held that under *Lopez* a "class of activities can substantially affect interstate commerce regardless of whether the activity at issue—in this case the taking of endangered species—is commercial *or noncommercial.*" *NAHB*, 130 F.3d, at 1049 (Wald, J.) (emphasis added). That reading of *Lopez* was expressly repudiated by this Court in *Morrison.* 529 U.S., at 610-11 (noting that this Court has *only* sustained regulations of intrastate activity based upon the activity's substantial effects on interstate commerce where "the activity in question has been some sort of economic endeavor"); *id.*, at 611 n.4 ("In every case where we have sustained federal regulation under *Wickard*'s aggregation principle, the regulated activity was of an apparent commercial character").

The D.C. Circuit in this case did not explicitly hold that "noncommercial" conduct could be aggregated under the first *Lopez* prong, but it specifically noted that it found nothing in *Morrison* to undercut *NAHB*'s holding that *Lopez* allowed regulation of non-economic conduct. Pet. App. 15a. And it effectively reached the same conclusion that *NAHB* had by shifting the focus of the inquiry from the non-commercial activity actually regulated by the ESA (the

"take" of non-commercial toads) to the character of the entity doing the taking (here, a home builder that constructed a fence on its property and proposed ultimately to build some homes). Pet. App. 16a-17a.[1]

The conflict with this Court's decisions in *Lopez* and *Morrison* is manifest. Instead of focusing on the nature of the actor whose conduct was at issue in those cases, as the D.C. Circuit did below, this Court focused on the regulated activity as described by the "terms" of the statutes—gun possession in a school zone in *Lopez*, and gender-motivated violence in *Morrison*, neither of which *by their terms* had anything to do with commerce. *See Morrison*, 529 U.S., at 610 (noting that the statute at issue in *Lopez* "*by its terms* has nothing to do with 'commerce' or any sort of economic enterprise") (emphasis added). Indeed, had the D.C. Circuit's view prevailed in this Court, *Lopez* would have come out differently: Alfonso Lopez brought his gun to school *to sell*—a commercial transaction. *See United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993). *Morrison* would have come out differently as well, because under *United States v. Salerno*, 481 U.S. 739, 745 (1987), the mere possibility that some commercial activity could have been regulated within the bounds of the Commerce Clause would have prevented this Court's holding of facial invalidity.

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[1] In truth, as Judge Sentelle recognized in his opinion dissenting from the denial of Rancho Viejo's petition for rehearing en banc, Pet. App. 36a, even Rancho Viejo's proposed housing development was not "commercial" activity, in the constitutionally significant meaning of the term. Neither the erection of a fence nor the grading of soil, which is the supposed commercial activity resulting in the "take" of arroyo toad habitat at issue here, nor even the construction of homes on pads created as the result of the soil grading, is "commerce among the states." That the equipment used to grade the soil, or the materials used to construct the fence and homes, might at one time have moved in interstate commerce does not make the grading and fence building activities in interstate commerce.

B. The D.C. Circuit also dispensed with the second and third prongs of the "substantial effects" test articulated in this Court's holdings in *Lopez* and *Morrison*.

The D.C. Circuit expressly acknowledged that "Section 9 of the ESA has no express jurisdictional hook that limits its application, for example, to takes 'in or affecting commerce'"—the second prong in this Court's substantial effects analysis—but nevertheless held that the ESA's lack of "an express jurisdictional element is not fatal to a statute's constitutionality under the Commerce Clause." Pet. App. 10a. Instead, the D.C. Circuit chose to apply its own jurisdictional hook, holding that "[t]he absence of such a jurisdictional element simply means that courts must determine independently whether the statute regulates activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affect[] interstate commerce." *Id.*

In *Morrison*, this Court made clear that the jurisdictional element prong is an important part of the "substantial effects" analysis. The statute at issue in *Morrison* failed because instead of including a jurisdictional element, "Congress elected to cast [the statute's] remedy over a wider, and more purely intrastate, body of violent crime." *Id.*, at 613. The same is true in the instant case: Instead of prohibiting the "take" of arroyo toads that have a demonstrated effect on interstate commerce, the Service has elected to cast its net over a wider, and purely intrastate, class of activity. Neither *Lopez* nor *Morrison* permits such broad regulation, and the D.C. Circuit's holding to the contrary warrants this Court's review.

Similarly, the D.C. Circuit dispensed with the third prong of the *Lopez* "substantial effects" test. It expressly acknowledged that "[t]here are no [legislative] findings or history" with respect to the substantial effect on interstate commerce caused by the "take" of arroyo toads, but held that "neither

findings nor legislative history is necessary" because the effect of commercial housing construction on interstate commerce is visible to "the naked eye." Pet. App. 11a.

Again, the D.C. Circuit's holding shifts the focus from the activity actually regulated by the statute (or, in this case, the specific regulatory listing at issue) to the nature of the actor, contrary to this Court's holdings in *Lopez* and *Morrison*. It also rested on a rationale—that the construction of homes is subject to Commerce Clause regulation because the construction materials will have moved in interstate commerce—that was unanimously rejected by this Court in *United States v. Jones*, 529 U.S. 848, 857 (2000):

> Were we to adopt the Government's expansive reading of § 844(i) [the federal arson statute], hardly a building in the land would fall outside the federal statute's domain. Practically every building in our cities, towns, and rural areas is constructed with supplies that have moved in interstate commerce, served by utilities that have an interstate connection, financed or insured by enterprises that do business across state lines, or bears some other trace of interstate commerce. If such connections sufficed to trigger § 844(i), the statute's limiting language, "used in" any commerce-affecting activity, would have no office.

Although *Jones* was a statutory construction case, this Court limited the reach of the statutory language at issue in the case to avoid the "grave and doubtful constitutional questions" posed by the government's broader proposed reading. *See id.* (quoting, e.g., *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)). The D.C. Circuit's holding that Congress can regulate local land use decisions of state and local governments and the local activity of a private actor merely because of speculation that some of the materials that the private actor intends to use to build homes will come from out-of-state raises more than

just grave constitutional doubts; it is flatly inconsistent with this Court's Commerce Clause precedent.

C. The D.C. Circuit's "attenuation" analysis renders meaningless the fourth prong of the *Lopez* "substantial effects" test.

The D.C. Circuit also held that the effect of Rancho Viejo's commercial housing development was not too attenuated an effect on interstate commerce to fail *Lopez*'s forth prong:

> Rancho Viejo's 202-acre project, located near a major interstate highway, is ... one that "is presumably being constructed using materials and people from outside the state and which will attract" construction workers and purchasers "from both inside and outside the state."

Pet. App. 12a (quoting *NAHB*, 130 F.3d, at 1048 (Wald, J.)). As with its discussion of the first and third prongs of the *Lopez* "substantial effects" analysis, the D.C. Circuit shifted the focus from the activity actually regulated—the "takes" of arroyo toads—to the nature of the actor doing the take. By so doing, the D.C. Circuit eviscerated this Court's not-too-attenuated requirement by adopting what amounts to the following logic:

> The effects on commerce of disturbing arroyo toad habitat are direct rather than attenuated, despite the fact that there is concededly no known commerce in arroyo toads, because in this case the alleged habitat disturber wants to build homes, perhaps using materials that will travel in interstate commerce, and the homes it hopes to build will be near a highway, so some people who visit those homes might have traveled in interstate commerce.

If such effects on commerce do not stand in an attenuated relationship with the actual regulatory activity at issue here—

the listing of the non-commercial arroyo toad as endangered, and threatened enforcement action for erection of a fence on private property—then this prong of the *Lopez* "substantial effects" test has no meaning.

In sum, the listing of the arroyo toad aims at conduct that by its terms has nothing to do with interstate commerce. These are not, after all, Mark Twain's celebrated jumping frogs of Calaveras County, bought and sold for their spectacular jumping skills. As a result of the listing, toad habitat disturbances are prohibited whether caused by a "casual walk in the woods" or by sustained commercial activity. Pet. App. 24a-25a. The "taking" of arroyo toads and/or their habitat, therefore, even in the aggregate, has no substantial effect on interstate commerce because the toad is not itself an article of interstate commerce. There is no jurisdictional element that would confine toad "takes" to activities properly within the scope of Commerce Clause power. There are no legislative or regulatory findings that cumulative toad "takes" would have a substantial effect on commerce; indeed, the only findings—that the designation of arroyo toad habitat would *not* have a significant effect on commerce—are directly to the contrary. Finally, that some materials that would be used to build homes by a builder who erected a fence and would have to grade his land to prepare for home construction might have moved in interstate commerce is simply too attenuated a connection with interstate commerce to fall within the Commerce Clause power. In such circumstances, where the claimed connection with commerce is simply and obviously a mere pretext to regulate activity that is purely local and non-commercial, this Court's duty remains what it always has been:

> [S]hould Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal ... to say that such an act was not the law of the land.

M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819). Because the D.C. Circuit's holding to the contrary conflicts with this Court's Commerce Clause precedent, certiorari is warranted.

II. THE REASONING OF THE DECISION BELOW CONFLICTS WITH A RECENT DECISION BY THE FIFTH CIRCUIT.

The reasoning upon which the D.C. Circuit grounded its ruling below is also "conspicuously in conflict" with the reasoning of the Fifth Circuit in *GDF Realty, Inc. v. Norton*, 326 F.3d 622, 634 (5th Cir. 2003). *See* Pet. App. 35a (Sentelle, J., dissenting from denial of petition for rehearing en banc). There are several grounds of disagreement: First, and perhaps most fundamentally, whether the prohibition on the "take" of wholly-intrastate, non-commercial species can be viewed as aimed at economic activity simply because the particular litigant is an economic actor; second, whether this Court's decision in *Salerno* prevents a facial challenge on Commerce Clause grounds to any statute that reaches some commercial activity; third, whether *Lopez* and *Morrison* permit aggregation of non-economic as well as economic activity for purposes of demonstrating a substantial effect on interstate commerce; fourth, the importance of a jurisdictional element to this Court's analysis; and fifth, what effects on interstate commerce are simply too attenuated to support the exercise of Commerce Clause power. These conflicts in rationale provide the Court with a needed opportunity to clarify the Commerce Clause analysis it set forth in *Lopez* and *Morrison*, and thus warrant certiorari here.

A. The Fifth Circuit Has Explicitly Rejected The D.C. Circuit's View That A Regulation Of Endangered Species Is "Economic" Whenever It Is Applied To An Economic Actor.

Applying the same decisions of this Court in *Lopez* and *Morrison* that the D.C. Circuit ostensibly applied below, the

Fifth Circuit explicitly rejected the claim, adopted by the D.C. Circuit below, that federal regulation of non-commercial species is permissible if the activity constituting the "take" is itself economic:

> Neither the plain language of the Commerce Clause, nor judicial decisions construing it, suggest that, concerning substantial effect *vel non*, Congress may regulate activity (here, Cave Species takes) solely because non-regulated conduct (here, commercial development) by the actor engaged in the regulated activity will have some connection to interstate commerce.... To accept [such an] analysis would allow application of otherwise unconstitutional statutes to commercial actors, but not to non-commercial actors. There would be no limit to Congress' authority to regulate interstate activities, so long as those subjected to the regulation were entities which had an otherwise substantial connection to interstate commerce.

GDF Realty, 326 F.3d, at 634-35.

The species at issue here, the arroyo toad, is not the subject of commercial activity. As such, the Service's actions prohibiting the "take" of arroyo toads are not aimed at activity that is necessarily economic in nature, and are therefore not authorized under the Commerce Clause, even if some of the activity engaged in by Rancho Viejo is economic, and even if some of the activity engaged in by Rancho Viejo qualifies as interstate commerce.

Not only did the D.C. Circuit reach a different conclusion, it derided Rancho Viejo's claimed facial challenge to the extension of the ESA to wholly intrastate, non-commercial species as Rancho Viejo "wanting to have its cake and eat it too." Pet. App. 25a. Yet the Fifth Circuit fully grasped, and accepted, the parallel claim by GDF Realty: "[A]t issue is whether ESA's take provision is unconstitu-

tional *as applied* to six species of subterranean invertebrates found only within two counties in Texas." *GDF Realty, Inc.*, 326 F.3d, at 624; *see also id.*, at 627 ("the only question is the constitutionality *vel non* of the take provision *as applied* to the Cave Species" (emphasis added)). In other words, the Fifth Circuit permitted a facial challenge to a particular application of the ESA—the "take" of specific intrastate species—and the fact that GDF Realty was itself engaged in economic activity was immaterial because the regulatory expansion of the ESA was not aimed at economic activity.

Indeed, because GDF Realty proposed to construct "a shopping center (including a Wal-Mart) ... and office buildings (commercial development)," *id.*, at 626, rather than just private homes, as Rancho Viejo has proposed, the economic activity at issue in *GDF Realty* was much more directly related to interstate commerce than the activity at issue in the present case. The district court in *GDF Realty* had held, in accord with the D.C. Circuit's decision here, that GDF Realty's commercial development "activity, standing alone, 'would easily be classified as substantially affecting interstate commerce.'" *Id.*, at 633 (quoting 169 F. Supp. 2d at 658). The Fifth Circuit expressly rejected the district court's reasoning, holding that the district court had improperly "extended the scope of [the] relevant conduct beyond [GDF Realty's] cave species takes; it *primarily* considered [GDF Realty's] commercial motivations that would underlie the takes." *Id.* The Fifth Circuit concluded instead that, consistent with this Court's Commerce Clause decisions, "the scope of inquiry is primarily whether the *expressly regulated activity* substantially affects interstate commerce, *i.e.*, whether takes, be they of the Cave Species or of all endangered species in the aggregate, have the substantial effect." *Id.*

The Fifth Circuit found its analysis consistent with *SWANCC*, in which this Court, albeit in *dictum*, noted that aggregation based on the nature of the actor, rather than on

the activity that was the object of the regulation, would "raise significant constitutional questions." 531 U.S., at 173-74. Following this Court's admonition in *SWANCC* that it is necessary "to evaluate the precise object or activity that, in the aggregate, substantially effects interstate commerce," and this Court's focus on the activity "to which the statute *by its terms* extends," *id.*, the Fifth Circuit looked only to the specific regulated activity—"takes"—and not the commercial nature of the actor undertaking that activity.

The D.C. Circuit, relying on the very same passage from *SWANCC*, drew just the opposite conclusion, holding that the "precise activity" to be considered was Rancho Viejo's planned commercial development. Pet. App. 16a. While Rancho Viejo believes that the Fifth Circuit's view is the better reading of *SWANCC*, at the very least there is a great deal of confusion among the circuits with respect to the aggregation principle, warranting this Court's review.

The Fifth Circuit also expressly disavowed the D.C. Circuit's holding in *NAHB* (followed by the D.C. Circuit in the case at bar) and the Fourth Circuit's holding in *Gibbs*, to the extent those holdings looked to the "nature of the actor's general conduct" rather than the specific activity actually regulated by the ESA's "take" provisions. Again, the explicit split in rationales warrants this Court's attention.

B. The Circuit Courts Are Split On How This Court's Decision In *Salerno* Applies To Commerce Clause Cases After *Lopez*.

Another manifestation of this conflict between the D.C. and Fifth Circuits is in how the two courts addressed this Court's pre-*Lopez* decision in *Salerno*. As Judge Roberts noted in his dissent from the denial of the petition for rehearing en banc, "the approach [regarding *Salerno*] of the panel in this case and *NAHB* now conflicts with the opinion of a sister circuit—a fact confirmed by that circuit's quotation from the *NAHB* dissent." *See* Pet. App. 37a (Roberts, J., dis-

senting from denial of petition for rehearing en banc) (quoting *GDF Realty*, 326 F.3d, at 636 (quoting *NAHB*, 130 F.3d, at 1067 (Sentelle, J., dissenting))).

The D.C. Circuit relied upon *Salerno* despite the obvious inconsistency between *Salerno* and *Lopez*. The Fifth Circuit, in contrast, rejected the applicability of *Salerno* in the post-*Lopez* Commerce Clause context:

> [L]ooking primarily beyond the regulated activity [i.e., beyond the "take" of endangered species, to commercial development that is only indirectly regulated by the ESA] in such a manner would "effectually obliterate" the limiting purpose of the Commerce Clause. *Jones & Laughlin Steel Corp.*, 301 U.S. at 37. Concomitantly, the facial challenges in *Lopez* and *Morrison* would have failed. For instance, regulation of gun possession near schools, at issue in *Lopez*, would arguably pass constitutional muster as applied to a possessor who was a significant gun salesman. Therefore, § 922(q)(1)(A) could not have been facially unconstitutional. *See Salerno*, 481 U.S. at 745. Similarly, the Violence Against Women Act, at issue in *Morrison*, would arguably have been a constitutional exercise of Congressional power if it were used to prosecute a person who committed violence against women and then sold a substantial number of videotapes of the encounter in interstate markets. It too would have withstood a facial attack. Such results, of course, run contrary to *Lopez* and *Morrison*.

GDF Realty, 326 F.3d, at 635-36.

In holding that GDF Realty's own nature as a commercial developer was not sufficient for the Commerce Clause analysis, the Fifth Circuit found dispositive from *Lopez* the fact that Alfonso Lopez brought his gun to school for sale. The D.C. Circuit, in contrast, dismissed that fact, contending

that because it was not mentioned in the Supreme Court's own *Lopez* opinion, "the Supreme Court attached no significance to it." Pet. App. 17a; *see also Nebraska v. E.P.A.*, 331 F.3d 995, 998 and n.2 (D.C. Cir. 2003) (adhering to the *Salerno* analysis adopted in *Rancho Viejo*).

But that is just the point. While hugely significant under the D.C. Circuit's *Salerno* analysis, the fact that Alfonso Lopez brought his gun to school *to sell*—an obvious commercial motivation on the part of the actor—had no significance for the Supreme Court in *Lopez* or the Fifth Circuit in *GDF Realty* precisely because "neither the purposes nor the design *of the statute* ha[d] an evident commercial nexus." *Morrison*, 529 U.S., at 611 (quoting *Lopez*, 514 U.S., at 580 (Kennedy, J., concurring)) (emphasis added). A recent decision of the Ninth Circuit reached the same conclusion (albeit with respect to a different statute):

> [T]he regulation [banning possession of machine-guns] does not have an economic purpose .... More likely, section 922(o) was intended to keep machine-guns out of the hands of criminals—an admirable goal, but not a commercial one.

United States v. Stewart, No. 02-10318, 2003 WL 22671036, *4 (9th Cir., Nov. 13, 2003).

The purpose and design of the Gun Free Schools Zone Act at issue in *Lopez*—protecting school zones—did not change merely because the particular person prosecuted was engaged in a commercial action. Neither does the ESA's purpose and design of protecting endangered species (as applied to non-commercial species) change merely because some of Rancho Viejo's planned activities were economic in nature. Because the D.C. Circuit's failure to accept this important distinction, grounded in this Court's decision in *Lopez*, is fundamentally and explicitly at odds with the Fifth Circuit's treatment of the issue, this Court's review is warranted.

C. The D.C. Circuit's Decision Permitting Aggregation of Non-Economic Activity Conflicts With The Decisions Of Several Other Circuits.

The two circuit courts also disagree over the application of this Court's aggregation principle. While the D.C. Circuit aggregated all of the activity engaged in by the regulated litigant, the Fifth Circuit held that "[i]n light of *Lopez* and *Morrison* the key question for purposes of aggregation is whether the nature of the regulated activity is economic." 326 F.3d, at 630. This was important, according to the Fifth Circuit, lest the Commerce Clause be stripped of all limits:

> Whether and how Congress may apply the aggregation principle are controversial questions. The pitfalls are apparent. For example, any imaginable activity of mankind can affect the alertness, energy, and mood of human beings, which in turn can affect their productivity in the workplace, which when aggregated together could reduce national economic productivity. Such reasoning would eliminate any judicially enforceable limit on the Commerce Clause, *thereby turning that clause into what it most certainly is not, a general police power.*

Id., at 629 (emphasis in original) (quoting *United States v. Ho*, 311 F.3d 589, 599 (5th Cir. 2002)).

The Fifth Circuit recognized that this Court in "*Morrison* noted, for aggregation purposes, the importance of the economic nature of the regulated activity" when it specifically acknowledged that it had heretofore aggregated intrastate activity "*only* where the activity *is economic in nature*." *GDF Realty*, 326 F.3d, at 630 (emphasis in original) (quoting *Morrison*, 529 U.S., at 613 (emphasis added)). To allow aggregation of "noneconomic and noncommercial activity" "so long as, if aggregated," there would be "a substantial effect" on commerce, held the Fifth Circuit, "would vitiate *Lopez* and *Morrison*'s seeming requirement that the intrastate instance

of activity be commercial." 326 F.3d, at 638. "*Lopez* and *Morrison* stand against such a proposition." *Id.*

The D.C. Circuit, in contrast, relying on the identical passage from *Morrison*, implied that this Court had rejected a categorical rule, thus permitting the aggregation of non-economic activity in order to demonstrate a substantial effect on commerce. Pet. App. 15a n.10; *see also United States v. Rodia*, 194 F.3d 465, 481 (3rd Cir. 1999) ("the specific activity that Congress is regulating need not itself be objectively commercial, as long as it has a substantial effect on commerce"); *cf. United States v. Bongiorno*, 106 F.3d 1027, 1031 (1st Cir. 1997) (noting that the Court consistently has interpreted the Commerce Clause "to include transactions that might strike a lay person as 'noncommercial'").

The Fifth Circuit's position is not only a better reading of *Morrison*, but it is in accord with decisions of the First, Second, Third, Fourth, Ninth, and Eleventh Circuits as well. *See United States v. Zorilla*, 93 F.3d 7, 8 (1st Cir. 1996); *United States v. Holston*, 343 F.3d 83, 88 (2nd Cir. 2003); *Freier v. Westinghouse Electric Corp.*, 303 F.3d 176, 200-03 (2nd Cir. 2002), *cert. denied*, 123 S. Ct. 1899 (Apr. 28, 2003); *United States v. Whited*, 311 F.3d 259, 271 (3rd Cir. 2002), *cert. denied*, 123 S. Ct. 2234 (May 27, 2003); *Gibbs v. Babbitt*, 214 F.3d 483, 491 (4th Cir. 2000); *United States v. McCoy*, 323 F.3d 1114, 1119-20 (9th Cir. 2003); *United States v. Cortes*, 299 F.3d 1030, 1035 (9th Cir. 2002); *United States v. Ballinger*, 312 F.3d 1264, 1270 (11th Cir. 2002).

Because of the fundamental importance of this issue to the *Lopez* analysis, this conflict is alone sufficient to warrant this Court's review.

D. The Circuits Have Recently Split On Their Treatment Of The Jurisdictional Element.

The Circuits are also split on the significance of the jurisdictional element discussed in both *Lopez* and *Morrison*. Both the D.C. Circuit below and the Fourth and Fifth Circuits

in *Gibbs* and *GDF Realty*, respectively, have held that a jurisdictional element is not necessary to sustain Commerce Clause authority. Pet. App. 10a; *Gibbs*, 214 F.3d, at 387; *GDF Realty*, 326 F.3d, at 632-33. The Ninth Circuit, in contrast, has recently held that even having a jurisdictional element is not necessarily sufficient to sustain Commerce Clause authority.

In *United States v. McCoy*, 323 F.3d 1114 (9th Cir. 2003), the Ninth Circuit addressed the jurisdictional element in 18 U.S.C. § 2252(a)(4)(B), which makes unlawful the possession of child pornography "produced using materials which have been mailed or ... shipped or transported" in interstate commerce. *Id.*, at 1133. This jurisdictional element "provide[d] no support for the government's assertion of federal jurisdiction," held the Court. *Id.*, at 1126; *see also Stewart*, 2003 WL 226710367, at *3 (rejecting Commerce Clause authority for prosecuting possession of a homemade machinegun despite fact that some of the parts had been shipped in interstate commerce).

Thus, even had the ESA in general, or the arroyo toad listing in particular, contained a jurisdictional element limiting the federal regulatory reach to "takes" that resulted from "using materials which have been ... shipped" in interstate commerce, such would not be sufficient to sustain the exercise of Commerce Clause power under the Ninth Circuit's recent holdings. Rancho Viejo's use of such materials was more than sufficient for the D.C. Circuit, however, even absent any jurisdictional element. Pet. App. 10a-13a.

E. The Circuits Are Split On Whether The Commerce Effect of Tourism, Scholarly Articles, Scientific Travel, And Potential Future Medical Discoveries Is Too Attenuated To Sustain Commerce Clause Authority.

The Fifth Circuit in *GDF Realty* also rejected the government's claim that Cave Bugs "play a role in interstate

commerce" because "some scientists" "have traveled to Texas" to study the Cave Bugs and "articles about the Cave Bugs have been published in scientific journals." *GDF Realty*, 326 F.3d, at 637. In stark contrast, and despite the admonition by this Court in *SWANCC* that even a billion dollar bird hunting and watching tourism trade was likely too attenuated a connection to interstate commerce to sustain the government's "migratory bird" rule, 131 U.S., at 166, the D.C. Circuit below and the Fourth Circuit in *Gibbs* expressly accepted such contentions. Pet. App. 9a n. 2; *Gibbs*, 214 F.3d at 493-95.

Similarly, the Fifth Circuit in *GDF Realty* rejected as mere "conjecture" the government's claim that the potential for future medical discoveries provided a sufficient connection with interstate commerce to validate the regulation. *GDF Realty*, 326 F.3d, at 637-38. "The *possibility* of future substantial effects of the Cave Species on interstate commerce, through industries such as medicine, is simply too hypothetical and attenuated from the regulation in question to pass constitutional muster. *Id.* (citing *Morrison*, 529 U.S., at 612). The D.C. Circuit below and the Fourth Circuit in *Gibbs*, on the other hand, both accepted that conjectural rationale. Pet. App. 9a n. 2; *Gibbs*, 214 F.3d, at 494.

Conversely, the only rationale upon which the Fifth Circuit relied in *GDF Realty* to uphold the application of the ESA to wholly intrastate, non-commercial cave bugs has been rejected by the D.C. Circuit. The Fifth Circuit believed that the extension of the ESA to non-commercial species was permissible because of the potential effect on commerce that might arise from loss of a vibrant biodiversity in species. In *NAHB*, the D.C. Circuit accepted a biodiversity rationale of its own, but only in the context of total extinction cases, not, as here, in cases involving only the loss of a species in a portion of its range. Judge Wald stated in *NAHB* that the biodiversity rationale upon which she relied "provides support for the Endangered Species Act *only insofar as the Act prevents*

activities that are likely to cause the elimination of species." *NAHB*, 130 F.3d, at 1052 n. 10 (emphasis added). Thus, *NAHB*'s holding, unchanged by the D.C. Circuit in the present case, is in conflict with the Fifth Circuit on the only rationale accepted by the Fifth Circuit, a "circle of life" theory that might be good fodder for Disney's "The Lion King," but which would utterly destroy the distinction between "truly national and truly local" that this Court has adamantly sought to maintain.

CONCLUSION

Certiorari is necessary here to address fundamental elements of this Court's post-*Lopez* Commerce Clause analysis, in the specific context of whether Congress has the authority to regulate wholly intrastate, non-commercial species, and the local activities that impact their habitats. Accordingly, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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